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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1941.

No. 813

WILLIAM R. SKIDMORE,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING.

WM. SCOTT STEWART,
Counsel for Petitioner.

THE BUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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MAY IT PLEASE THE COURT:

This Honorable Court denied our petition for certiorari on February 2, 1942, without any accompanying statement, except that it was noted that Mr. Justice Murphy and Mr. Justice Jackson took no part. Insofar as we may be permitted to do so, we respectfully suggest that Mr. Justice Murphy and Mr. Justice Jackson consider this petition for rehearing. In England, as late as 1859, it was held that having been of counsel did not necessarily disqualify the judge. He was privileged to retire but was not bound to do so (30 Am. Jur., Judges, sec. 93, p. 798). We have a Federal statute (*Moran* v. *Dillingham,* 174 U. S. 153) prohibiting a judge who had heard a case in the trial court from sitting in review of his own judgment. There would have been no need of the statute if it had been clear that such a judge had no jurisdiction. There is some conflict in the authorities to be found collected in Ann. Cas. 1917A, 1236, and 96 A. L. R. 546, but *Kirby* v. *State,* 78 Miss. 175, 28 So. 846, 84 Am. St. Rep. 622, holds that a judge who had

been the prosecutor might sit in review even in the face of objection. In the case at bar we know of no jurisdictional barrier and add our express request for participation by Mr. Justice Murphy and Mr. Justice Jackson in the hope that the Honorable Justices will reconsider their withdrawal. Under the circumstances, no vote is in effect an adverse determination insofar as our petition is concerned. We respectfully present a point in this petition for reconsideration which should have nothing to do with the merits of the case or the persons involved, a question of grave importance involving the interests of the public generally, a decision of which must affect the result in other cases. We respectfully quote from 30 Am. Jur., Judges, p. 798, sec. 93, citing *Austin* v. *Lambert*, 11 Cal. (2) 849, *State* v. *Atkinson*, 116 Fla. 366, *State* v. *Young*, 31 Fla. 594, Anno 96 A. L. R. 546:

> "However it is the duty of a judge who is eligible and competent to sit in a cause to exercise his judicial functions therein, and to make all necessary orders and decrees pertaining thereto, regardless of personal embarrassment, feelings of delicacy or other considerations not amounting to legal disqualifications."

We appreciate that after all of the law which can be found upon the subject is considered, the final determination of whether or not the two named Justices will continue to withdraw remains with them. We also understand that our right to certiorari is discretionary, but it must be that your Honors either misconceived the record or overlooked authorities submitted. The law is so well settled that it must be that the record was not fully understood. For the sake of brevity, we stake our all upon but one point which we respectfully submit should entitle us to a hearing in this Honorable Court if the point is not misconceived. In the absence of any expression by your Honors, we look to the brief of the Government in the hope of finding the exact spot where your Honors inadvertently were led astray.

Our learned adversaries said (p. 12):

"II.

"THE COURT BELOW CORRECTLY HELD THAT THERE WAS NO EVIDENCE THAT THE GRAND JURY OR THE PETIT JURY WAS ILLEGALLY OR UNFAIRLY DRAWN.

"The petitioner contends that the grand and petit jurors were hand-picked 'to secure partisan jurors who favor the cause of the Government * * *' (Pet., pp. 23, 42-62). As the Circuit Court of Appeals declared, there was 'not one scintilla of evidence in this case to support the charge that the grand jury or the petit jury was illegally or unfairly drawn, * * * or that the appellant was thereby harmed.' (R. 489.) There was not even a suggestion that the procedure was secret or that the jurors were 'hand-picked' as alleged by petitioner (Pet. p. 42). Indeed, petitioner's affidavit shows that the jurors were selected by lot (R. 59)."

Upon rehearing your Honors will perceive that the Honorable Circuit Court of Appeals merely evaded the real issue and that the only reason that there was no evidence produced, other than affidavits, was that the trial court refused to permit any. This is made clear by the following, which we respectfully quote from our petition (p. 59):

> "Your Honors will see that the only reason that there was no evidence was that the prosecutor succeeded in blocking the offer of your petitioner to produce evidence."

As to the above quoted assertion by the Government attorneys in their brief that (p. 12):

> "Indeed, petitioner's affidavit shows that the jurors were selected by lot (R. 59)."

a reexamination of the record will disclose that the selection by lot was from the illegal list (R. 80), giving no defendant a chance to secure an impartial jury.

We respectfully quote from our petition (p. 46):

> "Then the record shows that the same discrimination existed as to the special venire called to try the

case at bar. As Mr. Justice Black said in *Pierre* v. *Louisiana,* 306 U. S. 354, if the prosecutors or authorities had had any contradictory evidence as to these conditions which are reflected by the records, they would have produced it. Mr. Ryan, representing the Government in the case at bar, said that (R. 82):

> "'the Government takes the position that the challenge to the array here shows on its face, together with the affidavit filed in connection with it, that it is not entitled, that it is not sufficient in law to entitle the defendant to quash the panel in this case.'

"It appears that the names were drawn by lot from the lists so selected (R. 59). But as in the *Pierre* case, there is no chance for a fair drawing by lot from a hand-picked list."

Your Honors will notice upon reconsideration that the Government attorneys quote the Honorable Circuit Court of Appeals as holding that there was no showing that "the appellant was thereby harmed." Our learned adversaries also say in a footnote (p. 15):

> "It is significant that, except by formal assignment of error, petitioner does not even argue that his conviction is not supported by the evidence."

Upon rehearing your Honors will perceive that your petitioner has always maintained his innocence. We did not understand that an argument upon that subject was called for in this Honorable Court.

> "There is not one law for an innocent man and another for a guilty man." (*People* v. *Rongetti,* 331 Ill. 581, 597.)

We respectfully submit that as soon as it is made to appear that a jury has been packed to favor the Government and that a defendant asserting such a condition is denied a hearing that prejudice must be presumed without any argument from us on guilt or innocence. Yet petitioner did not rest there on any presumption of prejudice but

pointed out special circumstances which were applicable to his particular case, making the illegal jury particularly harmful (our petition, p. 44).

Another point raised by the Government brief which may have confused this Honorable Court is to be found in the following quotation (p. 13):

> "This motion, therefore, was barred after June 13, 1940, by the provisions of the Act of April 30, 1934, (48 Stat. 648, c. 170, 18 U. S. C., Sec. 556a, Appendix A, *infra*, pp. 21-22) which require the filing of such pleas within ten days after arraignment."

We did not anticipate this point in our petition, for the reason that this contention was not made by the trial attorneys or mentioned in the Circuit Court of Appeals. It was well known here that the record shows (R. 51) that we were permitted to withdraw the plea of not guilty entered on June 3, 1940, for the purpose of making our objection to the jury. The provisions of the act referred to by the Government attorneys were waived. This permission to withdraw the plea of not guilty and the granting of leave to present our challenge to the array was granted by the trial court after consideration of our affidavit (R. 57). The trial court listened to argument and considered the affidavits (R. 80) and stated to the Government attorneys that (R. 82):

> "I would like to hear from you concerning this jury."

But the trial court refused to hear evidence, stating that he did not think it was his duty (R. 88). Here, upon rehearing, your Honors will find the crux of the question and the real issue, which real question we respectfully submit, will not be equivocated with or evaded on matters of procedure when your honors re-examine the record.

The learned Government attorneys also treated our point as if it were merely a complaint as to the portion of

the district from which the jurors were drawn. We respectfully quote from their brief (p. 14):

> "But it is well established that juries may be chosen from any part of the district; and the charge of prejudice has no support which entitles it to serious consideration. *Hyde* v. *United States*, 225 U. S. 374, 373-374; *Agnew* v. *United States*, 165 U. S. 36, 44."

This was the same evasion of the real complaint pretended by Mr. Ryan upon behalf of the Government at the trial (R. 82). They erected a man of straw for demolition. Your Honors will perceive upon rehearing that our point, as fully and properly presented, was not that described by the Government attorneys, and consequently is not so easily dismissed. Since our petition for certiorari was filed, your Honors have decided the case of *Glasser* v. *United States*, 86 Law Ed. 405, from which we quote:

> "Tendencies, no matter how slight, toward the selection of jurors by any method other than a process which will insure a trial by a representative group are undermining processes weakening the institution of jury trial, and should be sturdily resisted."

Your Honors said further:

> "So, if the picture in this case actually is as alleged in Glasser's affidavit, we would be compelled to set aside the trial court's denial of the motion for a new trial for all petitioners."

Your Honors will notice that the record was made in the *Glasser* case and in the case at bar by the same counsel. Glasser did not complain of his jury, as your Honors noted, until after the verdict. In the case at bar petitioner did everything humanly possible in vain to secure an impartial jury and to avoid the mockery of a trial before a packed jury. He challenged the array, which challenge was based upon affidavits as to the facts showing that jurors were hand-picked from suburban areas, from executives and from others likely to favor the Government, and from a list

from which the average householder and voter had been arbitrarily and systematically excluded, and he charged that jurors calculated to favor the Government had been selected. The Government attorneys practically demurred to his charges, which charges should shock the ordinary sense of decency and fair play. He implored the court for an opportunity to prove his charges, but the trial court ruled that it did not think it was its duty to examine into the manner in which the jury was packed. Then in his desperate effort to avoid a trial before a jury ready to convict, regardless of the evidence, your petitioner sought to waive the jury but was prevented (R. 89). Then petitioner renewed his objections to the jury in the form of a challenge for cause after having exhausted his peremptory challenges (R. 94). He protested against the illegal jury in his motions for a directed verdict (R. 434) his motion for new trial and at every other opportunity afforded him. So, we respectfully submit that unless your Honors misconceive or misapprehend the record your Honors must conclude that the picture is actually as represented, not only in the *Glasser* case and in the case at bar, and such outrages against a decent American trial is and have been the practice in our federal courts. As was said by Mr. Justice Anderson in *United States* v. *Standard Oil Co.*, 170 Fed. 988 (our Pet. p. 49):

> "however this thing happened, I don't like the looks of it. I don't see any reason why the qualified jurors, people who are qualified to be jurors, resident in Cook County and Chicago, should be systematically left out of this box."

Anyone reading the opinions of this Honorable Court can not escape knowing that your Honors abhor injustice, no matter who might be victimized in the particular case. Your Honors said in *Smith* v. *Texas*, 311 U. S. 128, 85 L. Ed. 106, 108 (Our Pet. p. 48):

> "It is part of the established tradition in the use

of juries as instruments of public justice that the jury be a body truly representative of the community."

Your Honors indicate by opinion in the *Glasser* case that his continued insistence that he was innocent might have a basis in fact. Surely, your Honors do not endorse a judicial system, such as prevails in Cook County, by which innocent men may be convicted. The records show that the lawyers of Chicago are continually bumping against a stone wall in our Circuit Court of Appeals, protesting in vain against the unfair manner in which juries are selected (*Needham* v. *U. S.*, 73 F. (2) 1, *Seadlund* v. *U. S.*, 97 F. (2) 742, 747 (our Pet. p. 52). It is true, of course, that the Circuit Court of Appeals was able to find a legal basis for denial of relief because of procedural matters in the cited cases, but the smoke is there and the fire rages. So the tragedy of it all seems to be that after we finally break through all of the barriers and present a record properly preserving the point for decision here, an opportunity for a hearing in this Honorable Court is inadvertently denied us. Surely, we may be permitted the respectful suggestion that your Honors denial appears to have been decided without due consideration of the real issue. We may have been at fault for presenting other points but it is unfortunate if for any reason this point escaped the attention it deserves. It has been our observation that when inferior courts attempt to cover up unfair practices prevailing in the selection of juries, that your Honors pierce through the verbiage and deal summarily with the real question. In the case at bar, the Circuit Court of Appeals adopted a method of evasion which was not original, and which method was unmasked by this Honorable Court in *Carter* v. *Texas*, 177 U. S. 422. That the honorable Circuit Court of Appeals was mindful of that decision is shown by a quotation from the *Johnson*

case, in which your Honors allowed the writ (our petition, p. 6):

> "The defendants were entitled to an opportunity to offer evidence in support of the motion and plea. *Carter* v. *Texas*, 177 U. S. 442, 447."

We still have hope, which springs eternal, that upon rehearing your Honors will grant the writ, unmask the manner in which the main point has been evaded, and upon final rehearing give relief not only to petitioner but put a stop to an illegal practice which should not be further tolerated in a civilized community.

It is significant that your Honors conclude in the *Glasser* case that if the picture is as Glasser states it, a new trial is in order. We gather that your Honors find it difficult to believe that such a condition as that pictured by Glasser and more fully by petitioner, could exist. The difficulty of securing belief as to conditions in Chicago is that those removed from local conditions can not seem to believe that such practices would be tolerated by those in charge. Your Honors have overlooked the fact that an evil situation can exist so long that for some reason or other no one wants to be first to favor taking an advantage from the prosecution. Our trial courts seem to be unwilling to criticize those in charge of jury selection. The Circuit Court of Appeals has failed to grant relief. Your Honors are not only a court of last resort in the sense that your Honors exercise supreme jurisdiction, but your Honors constitute our last hope if there be any hope of relief against an intolerable system. A rehearing is respectfully prayed.

Respectfully submitted,

Wm. Scott Stewart,
Counsel for Petitioner.

CERTIFICATE OF COUNSEL.

Wm. Scott Stewart, counsel for petitioner in the above entitled cause, hereby certifies, as required by rule 33, that the foregoing petition for rehearing is presented in good faith and not for delay. Further that in his opinion the manner in which the jury was selected, which point is respectfully urged for reconsideration, is substantial and should of itself merit a rehearing and eventually move this Honorable Court to take jurisdiction on certiorari.

WM. SCOTT STEWART,
Counsel for Petitioner.